

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IAN WAGNER,

Defendant.

4:20CR3099

UNITED STATES' RESPONSE TO
DEFENDANT'S OBJECTION/MOTION
IN LIMINE

Comes now the United States of America, by and through the undersigned attorney, and provides this response to Defendant Ian Wagner's Motion in Limine. Filing No. 26. On January 5, 2021, the Government filed a notice of its intention to use 404(b) evidence and supportive brief. Filing Nos. 20 and 21. In its brief, the Government outlined four other incidents where the Defendant masturbated in public and the police had responded to the scene. Filing No. 21. Defendant now moves in limine to preclude the Government from introducing evidence of these other acts arguing that the acts were too dissimilar and remote in time from the conduct charged and that the probative value is outweighed by potential prejudice. Filing No. 29 at p. 2. Defendant further argues the evidence of these other acts should not be admitted because the Defendant was never convicted. Id. at p. 3.

The Government previously addressed each of the points raised by Defendant in its prior brief, filing no. 21, and now incorporates that brief by reference for this response for the full background information and argument. As set forth in Filing No. 21, the contested evidence is relevant to showing Defendant's common plan or scheme, intent, and identity in connection with a charged offense. Filing No. 21. The other acts were similar in kind to the charged conduct: In each prior incident, as well as in the current case, Defendant was seated in an enclosed space with

the ability to view public spaces, exposed his penis, and masturbated. He also sometimes interacted with the women nearby by making eye contact, moving his body to further expose his penis, and making sexually explicit comments. Whether Defendant was in an airplane, car, or standing in front of a gas station, whether he was in Indiana or any other place, the ultimate act was the same in each situation—the Defendant exposed himself, masturbated in public, and attempted to engage the women around him while doing so. The acts were not too remote in time with the oldest event occurring around four years before the charged conduct, and the most recent act occurring mere months before the charged conduct. *See* Filing No. 21 at p. 7.

As also discussed in the Government’s prior brief, a conviction is not a requirement for the admission of prior acts under 404(b), instead the acts merely must be proven by “a preponderance of the evidence.” Filing No. 21 at p. 4 (citing *United States v. Gipson*, 446 F.3d 828, 831 (8th Cir. 2006)); *see also United States v. Lakoskey*, 462 F.3d 965 (8th Cir. 2006); *United States v. Shoffner*, 71 F.3d 1429, 1432 (8th Cir. 1995); *United States v. Edelmann*, 458 F.3d 791, 809 (8th Cir. 2006). The Government intends to prove each of these other acts through the eyewitness testimony of the women who experienced the Defendant’s acts, as well as the law enforcement officers who responded to the scene and identified the Defendant as the perpetrator. Filing No. 21 at p. 7.

Finally, the danger or unfair prejudice does not outweigh the significant probative value of the evidence and any danger of prejudice can be overcome by a limiting instruction. Filing No. 21 at pp. 8-9.

Wherefore, the Government submits that the admission of each of the four other acts is appropriate under Rule 404(b) to show showing Defendant’s common plan or scheme, intent, and identity in connection with a charged offense and incorporates its previous brief, filing no. 21, for further information and argument.

Respectfully submitted this 27th day of May 2021,

Jan W. Sharp
Acting United States Attorney

By: s/ Tessie Smith
TESSIE L.S. SMITH, #25828
Assistant U.S. Attorney
487 Federal Building
100 Centennial Mall North
Lincoln, NE 68508-3865
Tel: (402) 437-5399
Fax: (402) 437-5390
E-mail: tessie.smith@usdoj.gov